



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2017-0382; FRL- 9974-66-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Revisions to Implement the Revocation of the 1997 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Commonwealth of Virginia (Virginia) state implementation plan (SIP). The revisions are related to the implementation of the 2008 ozone national ambient air quality standards (NAAQS or standards) and the revocation of the 1997 ozone NAAQS. EPA is approving these revisions updating the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2017-0382. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

available through <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Sara Calcinore, (215) 814-2043, or by e-mail at calcinore.sara@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Under the CAA, EPA establishes NAAQS for criteria pollutants¹ in order to protect human health and the environment. In response to scientific evidence linking ozone exposure to adverse health effects, EPA promulgated the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone NAAQS, in 1979. *See* 44 FR 8202 (February 8, 1979). The CAA requires EPA to review and reevaluate the NAAQS every 5 years in order to consider updated information regarding the effects of the criteria pollutants on human health and the environment. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA strengthened the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. The 0.075 ppm standard is referred to as the 2008 ozone NAAQS and is more stringent than the previous 1997 ozone NAAQS. *See* 73 FR 16436 (March 27, 2008).²

On March 6, 2015, EPA issued a final rule addressing a range of nonattainment area SIP requirements for the 2008 ozone NAAQS. 80 FR 12264. This final rule also revoked the 1997

¹ The “criteria pollutants” include ozone (O₃), particulate matter (PM), sulfur dioxide (SO₂), nitrogen dioxide (NO₂), carbon monoxide (CO), and lead (Pb).

² On October 1, 2015, EPA strengthened the ground-level ozone NAAQS to 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). This rulemaking addresses the 2008 ozone NAAQS and does not address the 2015 ozone NAAQS.

ozone NAAQS and established anti-backsliding requirements for areas not attaining the 1997 ozone NAAQS in 40 CFR 51.1105 that became effective once the 1997 ozone NAAQS was revoked. The anti-backsliding provisions require states to retain all applicable control requirements for the 1997 ozone NAAQS, while enabling states, where possible, to focus planning efforts on meeting the more protective 2008 ozone NAAQS. According to EPA's final rule, the revocation of the 1997 ozone NAAQS was effective as of April 6, 2015.

On September 9, 2016, Virginia amended the Virginia Administrative Code to be consistent with EPA's March 6, 2015 final rule. On February 10, 2017, Virginia, through the Virginia Department of Environmental Quality (VADEQ), formally submitted a SIP revision (Revision G16) reflecting these amendments.

On August 17, 2017 (82 FR 39097 and 82 FR 39031), EPA simultaneously published a notice of proposed rulemaking (NPR) and a direct final rule (DFR) for Virginia approving the SIP revision. EPA received two adverse comments on the rulemaking and attempted to withdraw the DFR prior to the effective date of October 16, 2017. However, EPA inadvertently did not withdraw the DFR prior to that date and the rule automatically and prematurely became effective on October 16, 2017, revising Virginia's SIP to reflect the revocation of the 1997 ozone NAAQS. In the NPR, EPA had proposed to approve the SIP revision, which included amendments made to provisions in Virginia's State Air Pollution Control Board's Regulations for the Control and Abatement of Air Pollution including 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30. These revisions to the Virginia Administrative Code amended Virginia's regulatory provisions to reflect EPA's revocation of the 1997 ozone NAAQS and the implementation of the 2008 ozone NAAQS. In this final rulemaking, EPA is responding

to the comments submitted on the proposed revision to the Virginia SIP and is reapproving the revisions to the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS after our failure to withdraw the DFR (after EPA received adverse public comments) prior to the October 16, 2017 effective date of the DFR.

II. Summary of SIP Revision and EPA Analysis

Virginia's February 10, 2017 SIP submittal included amended versions of 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30. Virginia requested that EPA approve the SIP revision so that these amended regulations would become part of the Virginia SIP. The amendment to 9VAC5-20-204 added text stating that the list of Northern Virginia moderate nonattainment areas under the 1997 ozone NAAQS is no longer effective after April 6, 2015, the effective date of the revocation of the 1997 ozone NAAQS. The amendment to 9VAC5-30-55 added text stating that the primary and secondary ambient air quality standard of 0.08 ppm shall no longer apply after April 6, 2015. Virginia also amended the Regulation for Transportation Conformity and the Regulation for General Conformity by adding clarifying text to 9VAC5-151-20 and 9VAC5-160-30 stating that "The provisions of this chapter shall not apply in nonattainment and maintenance areas that were designated nonattainment or maintenance under a federal standard that has been revoked." These revisions to the Virginia Administrative Code reflect EPA's revocation of the 1997 ozone NAAQS.

EPA's review of this material indicates the February 10, 2017 submittal is approvable as it revises regulations to be consistent with EPA's final rule implementing the 2008 ozone NAAQS. *See* 80 FR 12264 (March 6, 2015). The revisions update regulations to reflect the revocation of the 1997 NAAQS, which was effective April 6, 2015. Therefore, the revisions do not affect

emissions of air pollutants or interfere with any applicable requirement concerning attainment or reasonable further progress or any other applicable requirements in the CAA. Thus, EPA finds the revision approvable in accordance with section 110, including section 110(l), of the CAA.

III. Public Comments and EPA's Responses

EPA received two anonymous public comments on our action to approve the February 10, 2017 SIP submittal.

Comment: The first commenter stated that EPA cannot revoke the 1997 ozone NAAQS and cited a current court case in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The commenter recommended that EPA wait until the D.C. Circuit's decision and not "loosen standards."

Response: EPA would like to clarify that the proposed revision to the Virginia SIP does not revoke the 1997 ozone NAAQS as the 1997 ozone NAAQS were revoked previously by EPA in a separate rulemaking effective April 6, 2015. *See* 80 FR 12264. The commenter's ability to challenge revocation of the 1997 ozone NAAQS was in that prior rulemaking. This particular rulemaking action is only removing references to the "revoked" 1997 ozone NAAQS that had been in Virginia's SIP. Thus, the commenter's statement that EPA should not revoke the 1997 ozone NAAQS is not relevant to this rulemaking.

EPA acknowledges that there is presently a legal challenge in the D.C. Circuit to the rulemaking which revoked the 1997 ozone NAAQS.³ However, EPA disagrees with the commenter that EPA should wait for the outcome of this litigation before approving the Virginia SIP revision.

³ *South Coast Air Quality Management District v. EPA*, Case Nos. 15-1115, 15-1123 (U.S. Court of Appeals, D.C. Cir.).

As stated above, this SIP revision does not revoke the 1997 ozone NAAQS as the revocation of the NAAQS was effective on April 6, 2015 per EPA's March 6, 2015 rule. Additionally, nothing in section 110 of the CAA prevents Virginia from removing its references to the revoked 1997 ozone NAAQS from its SIP, as the removal does not affect emissions of air pollutants as it does not impact any applicable SIP requirements that apply to an area, interfere with any applicable requirements in the CAA, nor interfere with reasonable further progress. *See* section 110(l) of the CAA. Thus, EPA finds the revision approvable in accordance with section 110, including section 110(l), of the CAA.

In response to the commenter's concern that EPA's approval will "loosen standards," EPA notes that the 2008 ozone NAAQS of 0.075 ppm, which EPA is presently implementing in collaboration with states such as Virginia, is more protective of human health and the environment than the 1997 ozone NAAQS of 0.08 ppm. In addition, the ozone nonattainment areas in Virginia are the same for the 1997 ozone NAAQS as for the 2008 ozone NAAQS. Thus, removing the revoked 1997 ozone NAAQS from the Virginia SIP is not expected to have any emissions impact nor interfere with reasonable further progress or any applicable CAA requirement. *See also* 80 FR 12264.

Comment Summary: The second commenter requested that EPA not revoke the ozone NAAQS.

Response: As discussed in detail in response to the first comment, EPA's approval of the removal of references in the Virginia SIP to the revoked 1997 ozone NAAQS does not actually revoke the 1997 ozone NAAQS as EPA previously effectuated that revocation in a prior, separate rulemaking. *See* 80 FR 12264.

IV. Final Action

EPA is approving the Virginia SIP revision submitted on February 10, 2017, which includes amendments made to several sections of the Virginia Administrative Code, including 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30, as a revision to the Virginia SIP because the revisions meet the requirements of CAA section 110. EPA is reapproving the revisions to Virginia's SIP because the revisions were added to the SIP prematurely on October 16, 2017 when EPA failed to withdraw its DFR after receiving two adverse comments on our direct final approval of the revisions to the Virginia SIP to reflect the revocation of the 1997 ozone NAAQS. This rule, which responds to the adverse comments received, finalizes our approval.

V. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to

documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

VI. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the revisions to 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 of the State Air Pollution Control Board's Regulation for the Control and Abatement of Air Pollution discussed in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through <http://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information). These materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.⁴

⁴ 62 FR 27968 (May 22, 1997).

VII. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication

of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action to approve revised provisions of the Virginia Administrative Code including 9VAC5-20-204, 9VAC5-30-55, 9VAC5-151-20, and 9VAC5-160-30 for inclusion in the Virginia SIP may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 9, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5-20-204, 5-30-55, 5-151-20, and 5-160-30. The revised text reads as follows:

§ 52.2420 Identification of plan.

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(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 20 General Provisions				
* * * *	* * *			
Part II Air Quality Programs				
* * * *	* * *			
5-20-204	Nonattainment Areas	11/16/16	<u>[Insert date of publication in the Federal Register],</u> <u>[Insert Federal Register Citation]</u>	Addition of Subdivision C. Previous approval 8/14/15.
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9 VAC 5, Chapter 30 Ambient Air Quality Standards [Part III]				
* * * *	* * *			
5-30-55	Ozone (8-hour, 0.08 ppm)	11/16/16	<u>[Insert date of publication in the Federal Register],</u> <u>[Insert Federal Register Citation]</u>	Subdivision D. is revised to read that the 1997 8-hour ozone NAAQS no longer apply after April 6, 2015. Previous approval

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
				6/11/13.
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9 VAC 5, Chapter 151 Transportation Conformity				
* * * * *				
Part II General Provisions				
5-151-20	Applicability	11/16/16	<u>[Insert date of publication in the Federal Register], [Insert Federal Register Citation]</u>	Subdivision B. is amended to address revoked federal standards. Previous approval 11/20/09.
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9 VAC 5, Chapter 160 General Conformity				
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Part II General Provisions				
5-160-30	Applicability	11/16/16	<u>[Insert date of publication in the Federal Register], [Insert Federal Register Citation]</u>	Subdivision A. is amended to address revoked federal standards. Previous approval 12/12/11.
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[FR Doc. 2018-03524 Filed: 2/21/2018 8:45 am; Publication Date: 2/22/2018]